(6)

No. 95-813

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRAD BENNETT, ET AL., PETITIONERS

v.

MARVIN PLENERT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly held that petitioners, two ranchers and two irrigation districts, could not invoke the citizen suit provision of the Endangered Species Act to challenge a biological opinion issued by the Fish and Wildlife Service.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 63 F.3d 915. The order of the district court (Pet. App. 19-29) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1995.[1] The petition for a writ of certiorari was filed on November 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Petitioners filed a suggestion for rehearing in banc. That filing was treated by the Court of Appeals as a petition for rehearing and suggestion for rehearing en banc, and was denied on November 20, 1995. App., *infra*, 1a.

STATEMENT

1. Congress enacted the Endangered Species Act (ESA or Act) to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b). To accomplish that goal, Congress directed the Secretaries of Commerce and the Interior to list threatened and endangered species and designate their critical habitats. See 16 U.S.C. 1533.[2] Section 7 of the ESA imposes substantive and procedural requirements upon federal agencies considering actions that might have adverse effects on listed species. 16 U.S.C. 1536. Under Section 7(a)(2), a federal agency must consult with the Secretary to ensure that any "action authorized, funded or carried out by such agency" is not likely to jeopardize the continued existence of any endangered or threatened species. 16 U.S.C. 1536(a)(2).

Section 7 and its implementing regulations prescribe a detailed consultation process to assist federal agencies in complying with the Act's substantive requirements. 16 U.S.C. 1536(b); see 50 C.F.R. Pt. 402. The agency considering an action (the "action agency") must determine in the first instance whether that action "may affect" a listed species. 50 C.F.R. 402.14. The regulations further provide that if the action agency determines that the proposed action "may affect" a listed species, it is then required to enter into formal consultation with the "consulting agency" (in this case, the FWS), unless the action

[2] The Secretary of the Interior and the Secretary of Commerce share responsibility for listing species and for other ESA duties. See 16 U.S.C. 1532(15). The Secretary of the Interior, who implements the ESA through the Fish and Wildlife Service (FWS), has responsibility for the endangered species of fish at issue in this case. See 50 C.F.R. 17.11, 402.01(b).

agency has concluded through preparation of a biological assessment or informal consultation that the action is not likely to adversely affect the listed species. *Ibid.*[3]

Following formal consultation, the consulting agency issues a "biological opinion" setting forth the agency's view as to whether the proposed action would be likely to jeopardize the continued existence of the listed species. 16 U.S.C. 1536(b); 50 C.F.R. 402.14. If the consulting agency concludes that jeopardy is likely, it must suggest any reasonable and prudent alternatives that it believes would avoid jeopardy. 16 U.S.C. 1536(b)(3)(A). While formal consultation will fulfill the action agency's procedural obligations under the Act and implementing regulations, reliance upon the consulting agency's biological opinion must be reasonable in order to satisfy the action agency's substantive obligations under the Act. *Pyramid Lake Paiute Tribe of Indians* v. *United States Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). The ultimate obligation to comply with Section 7(a)(2)'s mandate to avoid the likelihood of jeopardizing listed species rests with the action agency. 898 F.2d at 1415; see *Tribal Village of Aku-*

[3] Under the regulations, the action agency's determination that a proposed action is not likely to adversely affect a listed species requires the written concurrence of the consulting agency. 50 C.F.R. 402.13. If no such concurrence is reached, the regulations provide that formal consultation will be undertaken. 50 C.F.R. 402.13, 402.14. The consulting agency, however, can only request that the action agency enter into formal consultation; it cannot order the action agency to do so. 50 C.F.R. 402.14; see *Sierra Club* v. *Marsh*, 816 F.2d 1376, 1386-1387 (9th Cir. 1987); cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 569, 570 (1992) (opinion of Scalia, J.).

tan v. *Hodel*, 869 F.2d 1185, 1193-1194 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989); *Roosevelt Campobello Int'l Park Comm'n* v. *EPA* 684 F.2d 1041, 1049 (1st Cir. 1982); *National Wildlife Fed'n* v. *Coleman*, 529 F.2d 359, 371 (5th Cir.), cert. denied, 429 U.S. 979 (1976).

Primary responsibility for enforcement and implementation of the ESA is entrusted to officials of the federal government. See, *e.g.*, 16 U.S.C. 1540(a), (b), and (e)(6). The Act also contains a provision for "citizen suits." That provision states that

> any person may commence a civil suit on his own behalf—
>
> (A) to enjoin any person * * * who is alleged to be in violation of any provision of [the Act] or regulation issued under the authority thereof; or
>
> * * * * *
>
> (C) against the Secretary [of Commerce or the Interior] where there is alleged a failure * * * to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

16 U.S.C. 1540(g)(1).

2. Congress authorized the creation of the Klamath Irrigation Project in 1905, pursuant to the Reclamation Act of 1902, 43 U.S.C. 372 *et seq.*, in order to irrigate otherwise arid land. Administered by the Bureau of Reclamation (Bureau), which is located within the Department of the Interior, the Project is composed of lakes, rivers, dams, and irrigation canals in southern Oregon and northern California. Project water is stored primarily in Upper

Klamath Lake and in other reservoirs, including the Clear Lake and Gerber Reservoirs. In February 1992, the Bureau of Reclamation completed a biological assessment of the effects of the long-term operation of the Klamath Project on listed species and forwarded that assessment to the FWS. The Bureau determined, *inter alia*, that the Project's operation might affect two endangered species, the Lost River sucker and the shortnose sucker. The Bureau therefore requested formal consultation with the FWS pursuant to Section 7 of the ESA, 16 U.S.C. 1536. Pet. App. 3; Gov't C.A. Br. 7-9.

As a result of the consultation, the FWS issued a biological opinion concerning the effects of the proposed long-term operation of the Klamath Project. The FWS concluded that the "long-term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers." Pet. App. 3. The FWS recommended reasonable and prudent alternatives to avoid jeopardy to the endangered fish, which included the imposition of minimum water levels for the Upper Klamath Lake and the Clear Lake and Gerber Reservoirs. *Ibid.* The Bureau notified the FWS that it intended to adopt the FWS's recommendations. *Ibid.*

3. Petitioners are two individual ranch operators and two irrigation districts in the State of Oregon. They receive reservoir water from the Klamath Project. Petitioners filed the present suit for declaratory and injunctive relief, seeking to compel the FWS to withdraw portions of its biological opinion. Pet. App. 31-44. Petitioners named as defendants two FWS officials and the Secretary of the Interior. *Id.* at 31-32. Neither the Bureau nor any of its officials was named as a defendant, and the Secretary was identi-

fied only as the official "empowered by the ESA to make jeopardy determinations concerning threatened and endangered species." *Id.* at 35.

Petitioners asserted jurisdiction under the citizen suit provision of the ESA, 16 U.S.C. 1540(g)(1), and the federal question and declaratory judgment provisions of the Judicial Code, 28 U.S.C. 1331 and 28 U.S.C. 2201. Pet. App. 33. The complaint alleged that the defendants (respondents in this Court) had violated the ESA and its implementing regulations by (1) "improperly concluding on page 2 of the Biological Opinion that the [Bureau's] continued operation of the Klamath Project * * * is likely to jeopardize the continued existence of the Lost River and shortnose suckers," Pet. App. 40-41; (2) "improperly imposing restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs," *id.* at 41; and (3) "implicitly determining critical habitat for the Lost River suckers and the shortnose suckers in Clear Lake and Gerber reservoirs * * * without considering the economic impact of that determination," *id.* at 42.

4. The district court granted the government's motion to dismiss the complaint. Pet. App. 19-29. The court observed that "the Secretary's biological opinion is advisory in nature and does not compel compliance with its recommendations or require agencies to act or refrain from acting in any particular manner." *Id.* at 24. The court concluded that petitioners' interest in utilizing Klamath Project water for their own purposes "conflict[ed] with the Lost River and shortnose suckers' interest in using the water for habitat," and that petitioners "do not have standing under ESA based on an interest which conflicts with the interests sought to be protected by the Act." *Id.*

at 27. The district court also concluded that the challenged biological opinion did not constitute a *de facto* determination of critical habitat for the endangered suckers. *Id.* at 28 n.4.

5. The court of appeals affirmed. Pet. App. 1-18. The court framed the question before it as "whether [petitioners'] action is precluded by the zone of interests test"— *i.e.*, the usual requirement that a plaintiff challenging administrative agency action "must show that 'the interest sought to be protected by [the plaintiff was] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Id.* at 4-5 (quoting *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970)) (brackets in court of appeals opinion). The court of appeals stated that this Court's decision in *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388 (1987), had made clear that "some form of the zone test applies even in cases which are not brought under the Administrative Procedure Act[, 5 U.S.C. 701 *et seq.*]." Pet. App. 6. The court then determined that a zone of interests test applies to suits brought under the ESA's citizen suit provision, *id.* at 6-11, and that "only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA," *id.* at 11. The court observed that petitioners' complaint "belies any assumption that they seek compliance with the statute in order to further the goal of species preservation." *Id.* at 16. Rather, the court continued, petitioners "claim a competing interest—an interest in using the very water that the government believes is necessary for the preservation of the species." *Ibid.* Accordingly, the court held that petitioners

lack standing to bring their claims under the ESA, *id.* at 17, and it affirmed the district court's dismissal of the complaint, *id.* at 18.

ARGUMENT

The court of appeals correctly concluded that petitioners' claims were not cognizable under the citizen suit provision of the Endangered Species Act. Further review is not warranted.

1. Petitioners contend (Pet. 11-16) that this Court should grant certiorari in order to resolve a conflict between the decision below and the Eighth Circuit's ruling in *Defenders of Wildlife* v. *Hodel*, 851 F.2d 1035, 1039 (1988), opinion after remand, 911 F.2d 117 (1990), rev'd on other grounds, 504 U.S. 555 (1992). In *Defenders of Wildlife*, the Eighth Circuit stated that

> [u]nlike the constitutional [standing] requirements, Congress may eliminate the prudential limitations by legislation. * * * In this case, the ESA provides that "any person" may commence a suit to enjoin any person who is alleged to be in violation of the ESA. *See* 16 U.S.C. § 1540(g). Environmental associations are "persons" and may bring suit in their own name. *Id.* at § 1532(13). Defenders therefore need meet only the constitutional requirements for standing for their claims under the ESA.

851 F.2d at 1039. Immediately thereafter, however, the Eighth Circuit explained that the plaintiffs in that case satisfied the standing requirements of the Administrative Procedure Act because their "interest in preserving endangered species is directly within the zone of interests of the ESA." *Id.* at 1039

n.2.[4] In short, petitioners identify no decision permitting invocation of the ESA's citizen suit provision by plaintiffs who did not assert an interest in the preservation of listed species.[5] The question whether a "zone of interests" analysis applies to the ESA therefore does not warrant this Court's review.

2. Even if that question did merit review by this Court, the present case would not be a suitable vehicle for its consideration.

a. Even if the ESA's citizen suit provision were intended to eliminate all prudential limitations on standing with respect to all potential plaintiffs, petitioners would not be entitled to adjudication of their present claims because they lack standing under Article III. In *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), this Court reviewed the principles governing standing to sue in the context of an ESA case. The Court reiterated that at an "irreducible constitutional minimum," plaintiffs must establish (1) that they have suffered an "injury in fact"—an "invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," *id.* at 560

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[4] The court of appeals went on to conclude that the plaintiffs satisfied the standing requirements of Article III. 851 F.2d at 1039-1044. That determination was subsequently rejected by this Court in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992).

[5] The District of Columbia Circuit, like the court of appeals in the instant case, has applied a zone of interests analysis in resolving standing questions under the ESA. See *Idaho By and Through Idaho Public Utilities Comm'n* v. *ICC*, 35 F.3d 585, 592 (D.C. Cir. 1994); *Humane Soc'y* v. *Hodel*, 840 F.2d 45, 60-61 (D.C. Cir. 1988); *National Audubon Soc'y* v. *Hester*, 801 F.2d 405, 407 (D.C. Cir. 1986).

(citations and quotations omitted); (2) that their injury is fairly traceable to the challenged action of the defendant, and not the result of the "independent action of some third party not before the court," *ibid.* (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)); and (3) that their injury is "likely" to be "redressed by a favorable decision," 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38). In the present case, petitioners allege an injury (reduction in the volume of Klamath Project water available to them) that cannot be fairly traced to the FWS's biological opinion and that is not likely to be redressed by a decision in their favor.

The biological opinion at issue in this case sets forth the FWS's views as to the likely effects on listed species of the Klamath Project's continued operation. See 16 U.S.C. 1536(b). The FWS, however, does not determine whether a project or other action will proceed. Rather, the choice of whether and in what manner to go forward rests with the action agency. 50 C.F.R. 402.15. In the present case, the Bureau of Reclamation retained the legal authority to adopt or reject, in whole or in part, the recommendations set forth in the biological opinion. It is the Bureau's ultimate decisions regarding the allocation of Klamath Project water that are subject to judicial review, and a reviewing court may examine the biological opinion only in evaluating the reasonableness and legality of those decisions. See, *e.g.*, *Pyramid Lake*, 898 F.2d at 1415-1416 (stating that the "FWS's actions, or lack thereof, in preparing its opinions are relevant on appeal only to the extent that they demonstrate whether the [action agency's] reliance on the reports is 'arbitrary and capricious'") (citation omitted).

Petitioners, however, have challenged the FWS's biological opinion rather than the Bureau's decision to impose restrictions on their use of Klamath Project water. Petitioners' alleged injury is traceable not to the FWS's issuance of the biological opinion, but to the Bureau's decision regarding the allocation of Project water. That injury also would not be redressable by a favorable judicial decision, since the Bureau would remain free to impose the same restrictions on water allocation (whether based on ESA concerns or on other factors) even if the FWS's biological opinion were held to be erroneous. Because petitioners' alleged injury results from "the independent action of some third party not before the court," they have failed to satisfy the constitutional requirements for standing. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976); see *Defenders of Wildlife*, 504 U.S. at 568-571 (opinion of Scalia, J.); *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

b. Even if petitioners' alleged injury were traceable to the FWS's biological opinion, their claims would not be cognizable under the citizen suit provision of the Endangered Species Act. As relevant here, that provision authorizes private suits "to enjoin any person * * * who is alleged to be in violation of any provision of [the Act] or regulation issued under the authority thereof," 16 U.S.C. 1540(g)(1)(A), and suits "against the Secretary [of Commerce or the Interior] where there is alleged a failure * * * to perform any act or duty under [16 U.S.C. 1533] which is not discretionary with the Secretary," 16 U.S.C. 1540(g)(1)(C). See page 4, *supra*. That provision is inapplicable here, since issuance of a flawed biological opinion would not place FWS or the Secretary "in

violation of" the ESA, nor would it constitute a breach of a non-discretionary duty.[6]

c. Finally, petitioners' action would not have been cognizable under the ESA's citizen suit provision even if it had been brought against the Bureau of Reclamation. The gravamen of petitioners' claim is that the restrictions on Project lake levels suggested by the FWS and adopted by the Bureau were greater than necessary to avoid jeopardy to the listed species. Proof of that allegation would not establish a violation of the ESA. Section 7(a)(2) of the Act requires each action agency to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction of [critical] habitat of such species." 16 U.S.C. 1536(a)(2). Nothing in the ESA, however, requires federal agencies to permit the use of natural resources *up to* the point at which such use is likely

[6] There is, in particular, no basis for petitioners' contention that the Secretary violated 16 U.S.C. 1533(b)(2) and its implementing regulations by "implicitly determining critical habitat for the Lost River suckers and the shortnose suckers * * * without considering the economic impact of that determination." Pet. App. 42; see Pet. 27. Critical habitat may be designated only through notice and comment rulemaking under Section 4(a)(3) of the ESA, 16 U.S.C. 1533(a)(3). (Pursuant to Section 4 of the ESA, the Secretary of the Interior has proposed a rule designating critical habitat for the endangered Lost River sucker and shortnose sucker. See 59 Fed. Reg. 61,744 (1994).) The requirement that the Secretary "tak[e] into consideration the economic impact * * * of specifying any area as critical habitat," 16 U.S.C. 1533(b)(2), applies only to the official designation of critical habitat pursuant to Section 4(a)(3). There is no such thing as an "implicit" designation of critical habitat under the ESA.

to jeopardize the continued existence of a listed species. The Bureau's imposition of restrictions on water allocation that are unnecessary to avoid jeopardy would not violate the ESA. See 16 U.S.C. 1536(a)(1).

This is not to say that a federal agency's overprotection of listed species could never be the subject of a valid legal challenge. Petitioners might have sought judicial review of the Bureau's water allocation decisions under the Administrative Procedure Act by alleging that the Bureau's refusal to release additional water was arbitrary and capricious. See 5 U.S.C. 706(2)(A). Alternatively, petitioners might have contended that some *other* provision of law required the Bureau to allocate additional water.[7] 43 U.S.C. 390uu; cf. *Nebraska* v. *Wyoming*, 115 S. Ct. 1933, 1942, 1944-1945 (1995) (recognizing that challenges to operation of reclamation projects may be brought in federal district court). In either of those contexts, the reasonableness of the Bureau's belief that the restrictions it had imposed were required by or appropriate under the ESA might ultimately have been germane to the court's resolution of petitioners' legal claim.[8] Those claims would not have arisen

[7] The complaint in this case alleged that petitioners receive water from the reservoirs in question, see Pet. App. 33-34, and further alleged that "[t]he restrictions on lake levels imposed in the Biological Opinion adversely affect plaintiffs by substantially reducing the quantity of available irrigation water," *id.* at 40. The complaint did not allege, however, that petitioners possessed any legal entitlement to the water in question; and the petition does not contend that the Bureau's refusal to release the water violated any law other than the ESA.

[8] There is consequently no merit to petitioners' assertion (Pet. 16) that the decision of the court of appeals bars a

under (or alleged violations of) the ESA, however, and they consequently could not be brought pursuant to the ESA's citizen suit provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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potential plaintiff "unlucky enough to be dependent upon a federal project which makes use of a resource determined to be necessary for an endangered species" from challenging "any determination regarding disposition of the resource, even if the disposition is incompatible with the requirements of law." Nothing in the court of appeals' decision precludes petitioners or other similarly situated parties from asserting a legal challenge to the Bureau's allocation of Klamath Project water.

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94-35008

D.C. No. 94-35008

BRAD BENNETT, ET AL. PLAINTIFF-APPELLANTS,

v.

MARVIN L. PLENERT,
IN HIS OFFICIAL CAPACITY AS
REGIONAL DIRECTOR, REGION ONE,
FISH AND WILDLIFE SERVICE,
U.S. DEPARTMENT OF THE INTERIOR, ET AL.,
DEFENDANT-APPELLEES

[FILED NOV. 20, 1995]

ORDER

BEFORE: Pregerson, Canby, and Reinhardt, Circuit Judges:

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.